



December 7, 2021

Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Chair Jessica Rosenworcel
Commissioner Brenden Carr
Commissioner Geoffrey Starks
Commissioner Nathan Simington

RE: Promoting Fair and Open Competitive Bidding in the E-Rate Program
Notice of Proposed Rulemaking – WC Docket No. 21-455

This letter is being sent by K-12 High Speed Network ("K12HSN"). K12HSN is a program funded by the California Department of Education. The California Department of Education competitively selected the Imperial County Office of Education ("ICOE") as the Lead Education Agency (LEA) and manager of the K12HSN program.

K12HSN provides the California K-12 community with:

- Network Connectivity, Internet Services, and
- Teaching and Learning Application Coordination.

The mission of K12HSN is to enable educators, students and staff across California to have access to reliable high speed network which has the capacity to deliver high quality online resources to support teaching and learning and promote academic achievement.

K12HSN administers public K-12 schools' participation in the California Research and Education Network (CalREN). CalREN is the high-speed, high-bandwidth statewide network of 14 Hub Sites and circuits linking to 86 K-12 Node Sites, 11 University of California Node Sites, 24 California State University Node Sites, 111 community college Node Sites, as well as 6 Node Sites serving the three participating private universities. CalREN is also linked to the national Internet2 network forming an advanced state and national "Intranet" for educational use.

Network and Internet services to the 86 K-12 Node Sites are extended to 79% (7,946) of schools, 87% (861) of school districts, and 100% (58) of county offices of education in California, which provide direct service to nearly 4.8 million students.

We are writing to address the proposed changes to the competitive bidding process for the E-Rate program described in Notice of Proposed Rulemaking – WC Docket No. 21-455.

SUMMARY

In the proposed Notice of Proposed Rulemaking – WC Docket No. 21-455, the Federal Communications Commission ("FCC" or "Commission") seeks comment on a proposal to implement a central document repository, referenced as a "bidding portal," through which service providers would be required to submit their bids to the E-Rate program administrator, the Universal Service Administrative Company ("USAC"), instead of directly to applicants, with a waiting period of up to 28 days before applicants can access bids submitted in response to their FCC Form 470 service requests ("Proposal"). The

Commission seeks to protect against waste, fraud and abuse, and ensure E-Rate program funds are used for appropriate purposes by considering this Proposal.

In supporting the need for the Proposal, the Commission gives particular weight to an audit completed by the Government Accountability Office (“GAO”) that “identified opportunities to misrepresent compliance with competitive bidding requirements as an underlying fraud risk for the E-Rate program.” (See, Notice of Proposed Rulemaking – WC Docket No. 21-455, Section I.2. citing GAO, Telecommunications: FCC Should Take Action to Better Manage Persistent Fraud Risks in the E-Rate Program, GAO-20-606, 19 (Sept. 16, 2020) (2020 GAO E-Rate Report)). In addition, deference is given to the Commission’s Office of Inspector General (“OIG”) which “has recommended safeguards to protect the E-Rate program, including establishing a central repository for the submission of competitive bidding documents and a holding period, so that bids are not released to applicants until after the closing of a 28-day bidding window. (See *id.*, citing to Federal Communications Commission, Office of Inspector General, Semiannual Report to Congress, October 1, 2016 – March 31, 2017 (Washington, D.C.: May 2017)). Based on these recommendations, the Commission “proposes a change to the E-Rate program targeted at several goals: streamlining program requirements for applicants and service providers, strengthening program integrity, preventing improper payments, and decreasing the risk of fraud, waste, and abuse.” (See *id.*, at Section 3.)

These recommendations do not take into account that rather than enhance E-Rate program integrity and administrative efficiency, the changes described in the Proposal would create inefficiencies and serious scheduling delays that would create an undue burden on applicants wishing to participate in the E-Rate program. Specifically with regard to California law, California has an extremely strong public policy that requires proper public bidding and this public policy is understood by public agency applicants in California. Imposing the Proposal would lead to interference with California bidding laws and regulations regarding the submission of sealed bids and other statutory competitive negotiation processes. Further, the Proposal would undermine service providers’ willingness to participate in the E-Rate program, and limit the legal options that are available to applicants, such as the mini-bid process that is used with E-Rate qualified state master contracts. The totality of these drawbacks far outweighs the potential benefits of the Proposal.

We believe that there are alternative options to the Proposal available that would achieve the Commission’s stated goals of complying with the Commission’s competitive bidding rules, providing transparency and promoting fair and open competitive bidding processes, while minimizing potential fraud risk for the E-Rate program. Specifically, additional training and educational outreach would directly address an applicant’s lack of required document retention or knowledge of the competitive bidding requirements. In addition, collecting documents post-bid to support applicant certifications at the time a funding request is submitted to USAC would provide USAC with the required documentation without adversely impacting the bidding process for participating applicants.

The purpose of this Written Ex Parte Presentation is to summarize for the Commission the unforeseen negative consequences that implementing the Proposal would have on the E-Rate program. As we will discuss in more detail below, there are easily implemented alternatives to the Proposal that would achieve the Commission’s goals for the E-Rate program without the high costs that would result from implementation of the Proposal.

1. The Proposal would interfere with state bidding laws and regulations regarding the submission of sealed bids.

A. California law already requires strict compliance with bidding requirements.

California law already enforces a strong public policy requiring competitive bidding to protect taxpayers from fraud, corruption and carelessness on the part of public officials and the waste and dissipation of public funds. (See, *Miller v. McKinnon*, 20 Cal. 2d 83 (1942); *Graydon v. Pasadena Redevelopment Agency*, 104 Cal. App. 3d 631, 636 (1980), cert. den. (1980) 449 U.S. 983; *Inglewood-Los Angeles County Civic Center Authority v. Superior Court of Los Angeles County*, 7 Cal. 3d 861, 866-867 (1972).) It is settled law that competitive bidding statutes are for the benefit and protection of the public, not the bidders. (See, *Rubino v. Lolli*, 10 Cal. App. 3d 1059 (1970); *Charles L. Harney, Inc. v. Durkee*, 107 Cal. App. 2d 570 (1951).) As such, a contract made without compliance with competitive bidding, where such bidding is required by statute, is void and unenforceable as being in excess of the public agency's power. (See, *Miller v. McKinnon*, *supra*, 20 Cal. 2d 83, 88.)

In fact, no payments may be made by a public entity under a contract let in violation of competitive bidding laws. If such payments are made to a contractor under a contract let in violation of competitive bidding laws, the public agency may pursue a cause of action to recover the monies paid to the contractor for work and materials furnished to the public agency. (See, Cal. Const. art. XI, § 10; *Miller v. McKinnon*, *supra*, 83, 89 (1942); *Reams v. Cooley*, 171 Cal. 150 (1915); *Zottman v. San Francisco*, 20 Cal. 96 (1862)) Moreover, with regard to public school districts, if payments are made to a contractor under a contract let in violation of competitive bidding laws and the school district official invested by the governing board with authority to act on behalf of the district is found to have committed malfeasance, the school district official shall be personally liable for any and all moneys of the district paid out as a result of the malfeasance. (See, Cal. Ed. Code, § 17606.)

California's public policy protecting taxpayer funds is so strong that persons dealing with a public agency are presumed to know the law with respect to the requirement of competitive bidding and act at their peril, (see, *Miller v. McKinnon*, *supra*, 20 Cal. 3d 83, 89.) As such, no estoppel is available against a public agency so as to preclude recovery from a contractor of money paid under a contract without compliance with a statute requiring competitive bidding. (See, *Miller v. McKinnon*, *supra*, 20 Cal. 2d 83, 90; *Advance Medical Diagnostic Laboratories v. County of Los Angeles*, 58 Cal. App. 3d 263, 272 (1976)).

As is shown above, California law has stringent requirements already in place to protect taxpayers from fraud, corruption and carelessness on the part of public officials and the waste or misuse of public funds. California public agencies and service providers are charged with understanding this public policy and the requisite bidding requirements that are in place to support the public policy.

The vast majority of California applicants work diligently to adhere to California's bidding requirements as well as the Commission's bidding requirements for the E-Rate program and, as such, conduct fair and open competitive bidding processes, while minimizing potential fraud. In those rare instances where fraud may be found, there are robust protections already in place to disgorge those monies paid out as a result of fraud. These robust protections extend to situations where fraud may not be present, but perhaps a contract was let in violation of competitive bidding laws. The take away is that this legal framework protecting taxpayer funds already currently exists under California law giving the

Commission the legal tools it needs to protect E-Rate funds, even without the Proposal being in place.

B. A bid portal would interfere with contract formation and competitive bidding requirements.

(1) California Bidding Requirements.

The competitive bidding process applies the same rules of contract law which apply to contracts generally. (See, *Pacific Architects Collaborative v. State of California*, 100 Cal. App. 3d 110, 123 (1979).) Under California law, the competitive bidding process involves public advertisement for the submission of sealed bids, the public opening of bids, and the award of contracts to the lowest responsible bidder that is responsive to the solicitation for bids. This process is almost exclusively governed by statute under the California Public Contract Code, which applies in one respect or another to virtually all public entities in California.

"All bids shall be sealed and shall be publicly opened and read at the time set forth in the solicitation, provided any person present desires the bids to be so read." (See, Cal. Pub. Contract Code, § 10304.) No bids may be considered which have not been received prior to the closing time for bids set forth in the invitations to bids. The public agency is required to maintain confidentiality regarding each bid until the public opening and reading takes place. (See, *id.*) "After being opened the bids shall be available for public inspection and tabulations shall be completed within seven days." (See, Cal. Pub. Contract Code, § 10305.) Bids are irrevocable offers or options given to the public agency involved. (See, *M. F. Kemper Constr. Co. v. Los Angeles*, 37 Cal. 2d 696, 700, 704 (1951).)

With regard to the interplay between Federal and California requirements, it is established law that Federal law is supposed to work in conjunction with California law when it comes to competitive bidding requirements. Under Federal funding regulations, the non-Federal public entity must have and use documented procurement procedures, consistent with State, local, and tribal laws and regulations and the standards of this section, for the acquisition of property or services required under a Federal award or subaward. (See, 2 CFR § 200.318.) In other words, for example with regard to a school district applicant, a California school district must have complied with its own laws and regulations for the procurement of property and services to receive the Federal award. More specifically, "an eligible school, library, or consortium that includes an eligible school or library shall seek competitive bids, pursuant to the requirements established in this subpart, for all services eligible for support under § 54.502. *These competitive bid requirements apply in addition to state and local competitive bid requirements and are not intended to preempt such state or local requirements.*" (See, 47 CFR § 54.503 (b) Competitive Bidding Requirements; Emphasis added.)

(2) Bid Portal Interference with California Bidding Requirements and Legal Implications.

A California public agency will typically comply with the competitive bidding process by issuing an invitation for bids), or bid package which includes a variety of documents and information for the prospective bidder to consider in making its bid.¹For example, for

¹ It has been said that "[t]he request for public bids must be sufficiently detailed, definite and precise so as to provide a basis for full and fair competitive bidding upon a common standard and must be free

California educational agencies, the governing board must publish a notice calling for bids stating the work to be done or materials or supplies to be furnished and the time when and the place where bids will be opened. The notice must be published at least once a week for two weeks in a newspaper of general circulation published in the district, or if there is none, then in a newspaper of general circulation circulated in the county. A bid may not be received after the time fixed in the public notice for the opening of bids. (See, Cal. Pub. Contract Code, § 20112; Cal. Ed. Code, § 81641.) Sealed bids are opened at the time designated in the bid package and any interested member of the public may be present for the bid opening and may request that the bids be read aloud. At that time, the results are announced and the contract ordinarily is awarded to the lowest responsible bidder whose bid is responsive to the bid package.²

As is discussed below, creating a bid portal to be managed by USAC would have unintended consequences and would preempt compliance with California legal bidding requirements in contravention of 47 CFR § 54.503(b).

(a) Bid portal would prevent California public agencies with complying with California Public Contract Code requirements.

A key point that deserves further examination is that bids are supposed to be irrevocable offers given to the public agency involved in response to their bid package and the California Public Contract Code requires that bids be publicly opened and read aloud at the time set forth in the bid package. As noted above, interested members of the public are required to be permitted to witness the bid opening in a room physically available to members of the public.

(b) Bid portal would prevent independent review of bid processes, thus weakening E-Rate program oversight.

In practice, bidders often attend bid openings and review the bids submitted by all bidders. If a discrepancy is found, often times bid protests are lodged with the public agency once that bid opening has occurred and the bids have been examined. By implementing the Proposal and preventing the public and bidders from being present for a bid opening, the Commission would be removing an important oversight tool that helps ensure that the E-Rate program funds are spent correctly – namely other bidders. (Bid protests will be discussed below in more detail in [Section 1.C.](#))

(c) Bid portal would create barrier to contract formation process.

The bid portal would create third party interference in the contract formation process by having bids go to a third party controlled bid portal and not to the public agency involved. Further to this point, where no authorized signature appears anywhere on a bid, a bidder cannot be bound to perform. An apparent low bidder that wants to withdraw their bid after

of any restrictions tending to stifle competition.” (See, *Konica Business Machines v. Regents of University of California*, 206 Cal. App. 3d 449, 456 (1988)(quoting *Baldwin Lima-Hamilton Corp. v. Superior Court*, 208 Cal. App. 2d 803, 821 (1962)).

²California public agencies have the discretion to reject all bids received in response to an invitation to bid. (Cal. Pub. Contract Code, § 20166.) A low bidder has no legal right to compel acceptance of their bid. (See, *Judson Pacific-Murphy Corp. v. Durkee*, 144 Cal. App. 2d 377 (1956)).

bids are opened and prices disclosed may argue that their bid cannot be legally accepted by the public agency because it was not signed and thus, no binding contract was formed. The apparent low bidder would also have an argument that a valid contract could not be formed because of the lack of compliance with applicable California Public Contract Code requirements. Lastly, members of the public could challenge the California public agency's award decision via a bidding portal controlled by USAC due to their not complying with Public Contract Code requirements because, for example, members of the public will not be permitted to be in the room to witness the public opening of the bids in question, if a bid portal is the only avenue permitted for opening bids.³

(d) Bid portal would have a chilling effect on E-Rate participation.

Due to the interference that the Proposal would have with California public agencies complying with California bidding requirements, a California public agency could be deemed to be letting a contract in violation of California competitive bidding laws because the public agency would not be complying with required sections of the Public Contract Code and thus any contract entered into would be a void contract.

As noted above,⁴ there is substantial financial risk associated with a void contract that flows to the service provider. There is also a foreseeable impact on the public agency as well, however, as bidders may choose to challenge a public entity's actions, thus leading to litigation and its related costs as well as delayed project completion issues. Moreover, a public agency would be at risk of incurring high political costs if press coverage and public perception paint the public agency as being inefficient with public funds or not being fully aware of bidding requirements due to the litigation. As a result of these costs and risks, applicants and service providers would no doubt be hesitant to apply for E-Rate funding or proceed with E-Rate projects, thus having a chilling effect on participation in the E-Rate program.

C. A bid portal would impact bidders' ability to file bid protests, thus preventing independent review of bid processes and impacting the integrity of the E-Rate program

The Proposal proposes to amend 47 CFR Section 54.503(c)(4) to read as follows: "After posting on the Administrator's Web site an eligible school, library, or consortium FCC Form 470, the Administrator shall send confirmation of the posting to the entity requesting service. *Providers of services shall not respond to a request for services directly to the*

³ Further complicating the public process under this Proposal is California's statutory exceptions to traditional competitive bidding for procuring software and technology-related services and products. Under those statutes, the public agency is either permitted award to "one of the three lowest responsible bidders" for "electronic data-processing systems and supporting software . . ." (Cal. Pub. Contract Code, § 20118.1), or the public agency is authorized to publicly-advertise request for proposals (RFP) process for "computers, software, telecommunications equipment, microwave equipment" and select a vendor based on specific criteria which is in the public agency's best interests (Cal. Pub. Contract Code, § 20118.2). These procurement options are frequently used by California public agencies to take advantage of the statutes' flexibility in allowing each public agency to determine and select a vendor in the best interest of that public agency for that specific project.

⁴ (See, Section 1.A., above for a discussion of legal repercussions when contracts are let in violation of competitive bidding laws.)

requesting entity and shall not reveal responses to other parties, including other providers of services, but shall submit responses through a secured Web site portal ("bidding portal" or "bid portal") managed by the Administrator. The requesting entity shall then wait at least 28 days from the date on which its description of services is posted on the Administrator's Web site before making commitments with the selected providers of services. The confirmation from the Administrator shall include the date after which the requestor may sign a contract with its chosen provider(s)." (Emphasis added).

The Proposal also proposes to amend 47 CFR Section 54.503(c)(5) as follows: "Service providers shall respond to requests for services through a secured Web site portal ("bidding portal" or "bid portal") managed by the Administrator, by uploading bids into the portal. *Service providers will not have access to the bids of other service providers.* Service providers may anonymously submit questions or other inquiries to applicants through the bidding portal, to which applicants must respond during the competitive bidding process. *No communication between service providers and applicants related to the competitive bid or the competitive bidding process is permitted outside of the bidding portal during the competitive bidding process.* All potential program bidders and service providers must have access to the same information and must be treated in the same manner throughout the procurement process." (Emphasis added).

(1) California Responsiveness and Responsibility Issues.

Under California law, in order to be awarded a contract, the low bid must be "responsive" to the specification, and the low bidder must be a "responsible" bidder. As one court explained, a "bid is responsive if it promises to do what the bidding instructions demand. A bidder is responsible if it can perform the contract as promised." (*See, Taylor Bus Serv., Inc. v. San Diego Bd. of Educ.*, 195 Cal. App. 3d 1331, 1341 (1987).)

In practice, a bid which contains a mistake may not be responsive to the solicitation document. As a result, the bidder may have the opportunity to withdraw its bid without forfeiting its bid bond. Even if the bidder does not or could not withdraw its bid, another bidder may protest the award on the ground that a mistake made the bid materially non-responsive and unavailable for award. If a bidder cannot or does not withdraw its bid due to a mistake, its bid may still be challenged by another bidder seeking the award of the contract. Such a challenge would likely argue that the bid was materially non-responsive, and unavailable for award. A bidder also may protest on the ground that the low bidder is not responsible, although responsibility challenges are often more difficult, and require greater due process before a public entity may find a bidder not to be responsible.

Creating a bid portal would raise a host of issues for those public agency applicants that experience bidding issues under California law. For example, bid responsiveness issues are often identified by other bidders that are present when bids are opened and have an opportunity to immediately review the bid materials submitted. As noted above, the Proposal is such that bids would be submitted through a USAC bid portal and bidders would not be present when bids are open (in violation of California Public Contract Code requirements, as noted above) nor would bidders have an opportunity to review the bid documents that are opened at the designated time. Thus, the Proposal may have a perverse impact on the E-Rate program because bidders are often interested reviewers of bid documents when bids are opened. These bidders often identify when there are bidding issues present and bring them to the awarding agency's attention, thus preventing bids from being awarded when there are responsiveness or responsibility issues. This strengthens program integrity, prevents improper payments, and decreases the risk of

fraud, waste, and abuse. If the Proposal is implemented, this independent source of review would be removed.

Further, if there is a separate external USAC bid portal it is not clear how issues of responsiveness and responsibility would be resolved via the bid portal's involvement. If a bid is rejected as nonresponsive, the bidder must be given notice and an opportunity to submit materials in a manner defined by the applicant concerning the issue of responsiveness. In addition, if a bidder is deemed non-responsible, the public agency is required to conduct a hearing and allow the bidder to present evidence that it is qualified to perform the contract.

The Proposal prevents the type of communication needed to resolve bid protests, responsiveness inquiries and responsibility due diligence requirements because it explicitly states that "[p]roviders of services shall not respond to a request for services directly to the requesting entity . . . , but shall submit responses through a secured Web site portal ('bidding portal' or 'bid portal') managed by the Administrator." (See, Proposal proposed amendments to 47 CFR Section 54.503(c)(4).) The proposal also provides that "[n]o communication between service providers and applicants related to the competitive bid or the competitive bidding process is permitted outside of the bidding portal during the competitive bidding process." (See, Proposal proposed amendments to 47 CFR Section 54.503(c)(5).)

(2) California Bidders May Have Recourse Against Applicants.

A low responsive responsible bidder that is wrongfully denied a public contract may bring a writ of mandate or injunction to set aside the contract award to the higher bidder, thus enforcing the public applicant's representation that the contract will be awarded to the lowest responsible bidder. (See, *Inglewood-Los Angeles County Civic Center Authority v. Superior Court* (1972) 7 Cal. 3d 861.) If, however, by the time the basis for relief can be demonstrated the underlying contract already has been substantially or fully performed, the low responsive responsible bidder may maintain an action for monetary damages against the public entity.

If the Proposal is implemented, the transparency and communication necessary to deal with California's procedural due process requirements for determinations of responsiveness and responsibility will not be possible. As noted above, a bidder that is wrongfully denied a public contract because of the lack of a responsiveness or responsibility determination can file a writ of mandate or injunction to set aside the contract award and a public entity may potentially be liable for monetary damages.

2. The Proposal's costs will outweigh its benefits.

At the outset, it should be noted that the "GAO Audit" (see, GAO, Telecommunications: FCC Should Take Action to Better Manage Persistent Fraud Risks in the E-Rate Program, GAO-20-606, 19 (Sept. 16, 2020) (2020 GAO E-Rate Report)) does not report that there is widespread fraud within the E-Rate program that needs to be addressed via the Proposal, but rather that there are "[o]pportunities to misrepresent compliance with competitive-bidding requirements, such as competitive-bidding rules and processes, is a key underlying fraud risk" for the E-Rate program. (See, GAO Report at page 19.) As the GAO notes, "Fraud and 'fraud risk' are distinct concepts. Fraud relates to obtaining something of value through willful misrepresentation. Fraud risk exists when individuals have an opportunity to engage in fraudulent activity. . . . Also, according to GAO's Fraud Risk Framework, a 'fraud risk

factor' describes what conditions or actions are most likely to cause or increase the chances of a fraud risk occurring. See GAO, A Framework for Managing Fraud Risks in Federal Programs, GAO-15-593SP (Washington, D.C.: July 28, 2015). Although the existence of fraud risk factors does not necessarily indicate that fraud exists or will occur, they are often present when fraud does occur." (See, GAO Report, footnote 6 at page 3.)

Granted, the GAO Audit did cite to an instance in February 2020, when "a group of seven individuals working for schools, service providers, and E-Rate program consulting firms pled guilty to defrauding the E-Rate program by billing for equipment and services that were not provided, and obtaining more than \$2.6 million in program funds to which they were not entitled." (See, GAO Report at page 3.) The GAO Audit also noted that "FCC-reported estimated improper payments increased from approximately \$85 million to approximately \$140 million total from fiscal years 2014 through 2019. Improper payments could suggest that a program may also be vulnerable to fraud, although it is important to note that fraud is one specific type of improper payment and that improper payment estimates are not intended to measure fraud in a particular program. One of the most common root causes of these improper payments identified by FCC was lack of sufficient documentation to demonstrate program compliance. In this regard, when payments lack the appropriate supporting documentation, their validity cannot be determined and potentially fraudulent activities could be concealed." (See, GAO Report at page 3.) The GAO also notes that, "in funding year 2019, the E-Rate program received more than 35,000 applications and committed (i.e., authorized) approximately \$2.4 billion to roughly 99,000 eligible schools and 11,000 libraries, according to officials." (See, GAO Report at page 1.)

To summarize, the only need shown for the Proposal is that approximately one-tenth of one percent (\$2.6 million) of E-Rate funding in 2019 was fraudulently misspent by seven individuals. Further, although \$140 million was estimated to be spent on improper payments in 2019, this \$140 million represents only about 5.5% of the 2019 E-Rate funds committed in 2019, which total was approximately \$2.4 billion. Importantly, the GAO Report notes that "improper payment estimates are not intended to measure fraud in a particular program. One of the most common root causes of these improper payments identified by FCC was lack of sufficient documentation to demonstrate program compliance." (See, GAO Report at page 3.)

This is not to minimize the fact that public funds should be protected, but more so to make the point that the Proposal seeks to impose requirements on all applicants that will interfere with State legal requirements, potentially impact applicants' ability to participate in the E-Rate program when only a small amount of improper payments have been shown, and undoubtedly cost many millions of dollars of tax payer money to implement. The Commission has used a cost-benefit analysis in the recent past to decide against initiatives that were not deemed to be an effective use of public resources. As is cited in Notice of Proposed Rulemaking – WC Docket No. 21-455, "In the *2014 First E-Rate Order*, the Commission required publication of prices for goods and services purchased by applicants, but declined to require public disclosure of other pricing information, including available pricing from service providers or bid responses." The Commission "*noted that the 'current burden to applicants of submitting comprehensive bid information to USAC outweighs any incremental benefit to the public from the publication of prices for non-winning bids, which, by definition, were not the most cost-effective choice.'*" (Emphasis added. See, Notice of Proposed Rulemaking – WC Docket No. 21-455 at Section 7.)

As is shown above, the burden to applicants of complying with the requirements of the Proposal will outweigh any incremental benefit to the public from the Proposal. As is

discussed below, there are less onerous options available to the Commission that would address the improper payment issues without exacting the high cost shown above on all applicants. At the end of the day, the options discussed below would have a significantly lower cost to all parties and no doubt provide many, if not all, of the benefits sought by the Proposal.

3. Additional training and educational outreach would directly address an applicant's lack of required document retention or knowledge of the competitive bidding requirements.

We strongly agree that the Commission should consider changes to the training and outreach that USAC offers to applicants and service providers to address issues relating to competitive bidding and document retention. We have found that there is a lack of understanding with regard to the conceptual and legal difference between a request for bids and a request for proposals. In addition, under California law, the legislature has authorized modified forms of competitive bidding by statute. (See Cal. Pub. Contract Code, § 20118.1; Cal. Ed. Code, § 81645.) Once you add in the additional E-Rate bidding requirements, document retention and filing requirements it stands to reason that additional educational and training opportunities would be an effective mechanism for addressing the Commission's concerns.

Providing a robust and far reaching training and outreach program would go a long way toward providing the knowledge necessary for applicants to comply with their local procurement requirements as well as the USAC requirements and address the concerns identified by the 2017 OIG Report.

For example, an effective training would educate applicants on

- (1) The legal difference between a bid and a request for proposals;
- (2) Their local bid limits and bidding requirements for E-Rate projects;
- (3) The publication requirements for local procurement requirements and E-Rate requirements;
- (4) The need for clear bid specifications and contractual provisions which all bidders must meet; and
- (5) Applicable E-Rate requirements in conjunction with local requirements.

Of particular note, educating applicants on the role of clear bid specifications would go a long way to resolving the issues noted by the Commission. Bid specifications are an important part of all bidding requirements under California law. The courts have recognized a long and well-established rule that where municipal contracts are required to be let upon public bidding, the proposals and specifications inviting the bids must be sufficiently detailed, definite and precise so as to provide a basis for full and fair competitive bidding upon a common standard and must be free from any restrictions tending to stifle competition. (See, *Baldwin-Lima-Hamilton Corp. v. Superior Court of San Francisco* (1962) 208 Cal. App. 2d 803.) Consequently, [e]very element which enters into the competitive scheme should be required equally for all and should not be left to the volition of the individual aspirant to follow or disregard and thus to estimate his bid on a basis different from that afforded the other contenders, a common standard by which all bidders are to be measured being implied by the bidding law. (See, 10 McQuillin, *Municipal Corporations* (3d ed.) § 29.44.) If any bidder does not meet all of the material bid specifications or agree to all of the material contractual provisions, that bidder must be deemed a non-responsive

bidder and its bid rejected. (*See, Menefee v. County of Fresno* (1985) 163 Cal.App. 3d 1175.)

A robust educational and training component would be an effective approach to the concerns cited by the Commission. For example, the Commission's concerns reflected in the references below could be resolved by one component of the overall proposed education program identified above – educating applicants on bid specifications:

1. "The FCC Form 470 must specify and provide a description of the eligible services with sufficient detail to enable potential service providers to submit responsive bids for such requested eligible services." (*See, Notice of Proposed Rulemaking – WC Docket No. 21-455 at Section 4.*)
2. "Service providers must also carefully review for any specific requirements when responding to the requests for bids in a particular FCC Form 470 or Request for Proposal (RFP)." (*Id.*, at Section 5.)
3. "All potential program bidders and service providers must have access to the same information and must be treated in the same manner throughout the procurement process." (*Id.*)
4. "We also seek comment on whether service providers should be required to submit information in a manner that enables applicants to compare competing bids. Do applicants face difficulty in comparing bids because service providers have submitted their bid responses in a variety of formats?" (*Id.*, at Section 14.)
5. "Additionally, any additions or modifications to the FCC Form 470, RFP, or other requirements or specifications must be available to all potential providers at the same time and in a uniform manner. Schools and Libraries Sixth Report and Order, 25 FCC Rcd at 18799, para. 86. (*Id.*, at Section 29, footnote 61.)

4. Collecting documents post-bid would provide USAC with the required documentation without complicating the bidding process for participating applicants.

In addition to the educational and training component discussed above, the Commission may look to the Rural Health Care ("RHC") program for a less onerous approach to achieve its stated goals. The Commission requires applicants in the RHC program to submit to USAC evaluation criteria, bid sheets, a list of people who evaluated bids, memos, board minutes, or similar documents, and any correspondence with vendors during the bidding, evaluation, and award phase of the process. The Commission has noted in the past that "[h]aving such documents from E-Rate recipients would allow USAC to evaluate more fully the competitive bidding process conducted by E-Rate applicants and ensure that documentation of the competitive bidding process was retained in the event of an audit." (*See, id.*, at fn. 23 citing to Modernizing the E-Rate Program for Schools and Libraries, WC Docket No. 13-184, Notice of Proposed Rulemaking, 28 FCC Rcd 11304, 11355, paras. 194-95 (2013) (2013 E-Rate NPRM) and Rural Health Care Support Mechanism, WC Docket No. 02-60, Report and Order, 27 FCC Rcd 16678, 16786, para. 248 (2012) (Healthcare Connect Fund Order).)

This approach of coordinating the E-Rate approach to that of the RHC would not require the creation of a bid portal and all of its related complications. Instead, it would permit applicants to continue to comply with their required local, state and E-Rate bid requirements and deal with the associated complexities and complications on their own in accordance with their state laws, without interference by an external bid portal.

Once those bid requirements are met, the E-Rate applicants would be required to “submit documentation to support their certifications that they have selected the most cost-effective option at the time a funding request is submitted to USAC” and also “submit contract documentation with their funding requests” just as their RHC program applicants are required to do. (See NPRM at Section 22.) “The RHC program competitive bidding documentation rule requires applicants to: ‘submit documentation to support their certifications that they have selected the most cost-effective option, including a copy of each bid received (winning, losing, and disqualified), the bid evaluation criteria, and the following documents (as applicable): completed bid evaluation worksheets or matrices; explanation for any disqualified bids; a list of people who evaluated bids (along with their title/role/relationship to the applicant organization); memos, board minutes, or similar documents related to the service provider selection/award; copies of notices to winners; and any correspondence with service providers prior to and during the bidding, evaluation, and award phase of the process. Applicants who claim a competitive bidding exemption must submit relevant documentation to allow the Administrator to verify that the applicant is eligible for the claimed exemption.’ 47 CFR § 54.623(a)(3).” (See *id.*, footnote 55.)

This approach would meet the Commission’s stated goal of “align[ing] the competitive bidding documentation requirements of the E-Rate program with RHC program rules” without creating an overly burdensome bidding portal. (See, NPRM, Section 23.)

Moreover, this approach would address “[o]ne of the most common root causes of . . . improper payments identified by FCC” in that it would provide sufficient documentation to demonstrate program compliance. (See, GAO Report at page 3.) This would permit USAC to determine when appropriate payments should be made and identify fraudulent activities because the appropriate supporting documentation would be submitted.

In sum, this much less onerous approach would protect against waste, fraud and abuse, and ensure E-Rate program funds are used for appropriate purposes without having to incur the costs that will be imposed by the Proposal.

CONCLUSION

For all the reasons set forth above, the Commission should not proceed with the Proposal to implement a central document repository, (the “bidding portal”), through which service providers would be required to submit their bids to the E-Rate program administrator, USAC, instead of directly to applicants.

We urge the Commission to either withdraw the draft NPRM as it stands, or, to consider modifying the proceeding to a Public Notice in order to fully inform the record of the various state and local competitive bidding statutes and requirements which may be impeded by the adoption of a USAC-administered portal. We feel that a Public Notice proceeding will provide the Commission the opportunity to gain contextual insights on not only state and local practices that protect against waste, fraud and abuse but also on how the Commission and program stakeholders can mutually work in tandem to develop and promote practices to encourage competitive bidding compliance, minimize fraud risk, and promote fairness and transparency.